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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Inquiry Concerning the Deployment of	)	
Advanced Telecommunications	)	CC Docket No. 98-146
Capability to All Americans in a Reasonable	)	
and Timely Fashion, and Possible Steps	)	
to Accelerate Such Deployment	)	
Pursuant to Section 706 of the	)	
Telecommunications Act of 1996	)	

REPLY COMMENTS OF BROADCAST.COM

BROADCAST.COM

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REPLY COMMENTS OF BROADCAST.COM

Broadcast.com ("broadcast.com") respectfully submits this reply to the comments filed in response to the Federal Communications Commission ("FCC" or "Commission") August 7, 1988 Notice of Inquiry ("Notice") in the above-captioned proceeding. Broadcast.com did not file comments in response to the Commission's Notice but, upon review of the comments filed, wishes to address certain issues raised by the respondents.

I. INTRODUCTION

Broadcast.com is the leading aggregator and broadcaster of streaming media programming on the World Wide Web. With extensive network infrastructure and experience, the company delivers or "streams" hundreds of live and on-demand audio and video programs over the Internet and various intranets, reaching hundreds of thousands of users.

The several web sites controlled by Broadcast.com offer a comprehensive selection of programming, including sports, talk and music radio, television, business events, full-length compact disc recordings, and full-length audio books. The company services more than

460,000 different users per day and broadcasts on the Internet twenty-four hours per day, seven days per week. Broadcast.com's regular programming includes the following:

- Live continuous broadcasts of more than 355 radio stations and networks;
- Broadcasts of 21 television stations and cable networks;
- Play-by-play game broadcasts and other programming of more than 400 college and professional sports teams;
- Live and on-demand corporate and special events;
- Live music, including concerts and club events;
- On-demand music from a compact disc Jukebox, with more than 2100 full-length CDs;
- Live and on-demand special interest shows and Internet-only "Webcasts;" and
- More than 360 full-length audiobooks.

Since its first live broadcast in September 1995, Broadcast.com has accomplished much on the Internet, including the Internet broadcast of the first live commercial radio station, the first live sporting event, the first live corporate quarterly earnings call, and the first stockholders' meeting. In addition, Broadcast.com provides Internet and intranet broadcasting services to businesses and organizations, including turnkey production of live and archived press conferences, earnings conference calls, investor conferences, trade shows, stockholder meetings, and long-distance telecourses and media events.

Broadcast.com provides its extensive programming offerings through high-speed Internet connections to end-users—both over cable systems and through the use of xDSL equipment over traditional wireline networks. Due to the high volume of web-surfers tuning in to Broadcast.com's programming and the high bandwidth necessary to deliver that programming, it is essential to Broadcast.com that both of these high-speed networks continue to develop and be fully accessible to all ISPs. Additionally, Broadcast.com depends upon broadband delivery of its Internet products and services because it offers essential "always on" Internet capability and eliminates the need for end-users to "dial in" to the Internet. Accordingly, Broadcast.com's interest in this proceeding focuses on ensuring that the Internet continues to develop as a truly interactive medium; that the Internet itself remains free of government regulation that could potentially dampen the explosive growth witnessed in recent years; and that access to the Internet over high-speed, broadband networks of all types remains open, competitive, and free of monopoly-controlled bottlenecks that will prevent ISPs from reaching customers throughout the nation.

In this regard, the respondents to the Commission's Notice that seek to perpetuate both the cable operators' and the ILECs' longstanding monopolies over "last-mile" access to telecommunications networks threaten the widespread deployment of advanced telecommunications capability required by Section 706. Broadcast.com therefore urges the Commission to make its top priority in this proceeding the adoption of policies that will require cable operators and ILECs to offer access to their existing networks to competing service providers. Achievement of such a goal will ensure that the competitive goals of the Telecommunications Act of 1996 ("the 1996 Act") are met and that broadband products and services are made competitively available to all Americans.

II. DISCUSSION

As pointed out by MCI/WorldCom, consumers are much better served in the Internet arena with a "choice of thousands of ISPs" and with the assurance that all ISPs are afforded reasonable and nondiscriminatory access to advanced network elements and capabilities so that consumers can be offered competitive Internet-based services.[1] The rapid and widespread deployment of advanced telecommunications capability will not occur if data networks are controlled by monopolist providers—whether they be ILECs or cable operators. Rather, the Commission will benefit consumers, the market, and the development of broadband services by subjecting cable operators to unbundling and resale obligations and by ensuring that those obligations are strictly enforced as to the ILECs.

With respect to cable operators, the Commission should not adhere to traditional and outdated regulatory classifications that would serve only to perpetuate cable's stronghold over transmission facilities used to provide broadband Internet services to end-users. Rather, the Commission should ensure competitive access to cable's broadband hybrid fiber-coaxial ("HFC") network by recognizing that cable operators' provision of basic data transmission capability over their networks is a basic telecommunications service and requiring the unbundling of this service from any enhanced portion of their offerings. Even more importantly, cable operators should be required to offer broadband transmission capability—as well as access to their high-speed networks—to competing and unaffiliated Internet access and online service providers. In this regard, Broadcast.com supports strongly the comments of America Online and others that urge the Commission to subject incumbent cable monopolists to the same unbundling and access requirements imposed on other local loop monopolists.[2]

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1 Joint Comments of MCI Communications Corporation and WorldCom, Inc. at 28.

2 *See e.g.*, Comments of America Online, Inc. at 4.

Similarly, the ILECs should be required to offer access to their networks, over which high-capacity xDSL service is provided, to unaffiliated ISPs on a nondiscriminatory basis. As the Retail Internet Service Providers recognize in their comments, xDSL service is closely linked to competition in the market for Internet access. Yet because ILECs control the local loop transmission facilities linking xDSL equipment on either end, they are able to use their monopoly power in the local telecommunications market to favor affiliated ISPs over unaffiliated, competitive ISPs.[3] In this way, the ILECs have every opportunity and incentive to misuse their facilities' monopolies to discriminate against competitive ISPs. The Commission has long used its regulatory authority to curb such anticompetitive behavior and should do so now,[4] thereby opening the market to the competitive provision of broadband Internet services.

If the Commission does not require—with accompanying enforcement—facility owners such as cable operators and ILECs to provide nondiscriminatory access to their networks to all ISPs, as Mindspring Enterprises explains, "the danger for consumers is that their choices for ISP could concentrate down to the very small number of companies operating broadband local loops to their home or office location."[5] Consumer choice would be limited to the ILEC, the cable operator, or their respective, affiliated ISPs. With the

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3 *See* Comments of Retail Internet Services Providers at 7-9.

4 Several respondents similarly urge the Commission to enforce unbundling and resale obligations upon ILECs. *See e.g.*, Comments of The Internet Service Providers' Consortium at 11; Comments of The Commercial Internet Exchange Association at 14.

5 Comments of MindSpring Enterprises, Inc. at 20 (hereinafter "MindSpring Comments").

Commission estimating the current operation of more than 4,000 ISPs nationwide,[6] this result would be clearly contrary to the competitive goals underlying both the 1996 Act and Section 706.

Furthermore, a particular danger to the large-scale programming efforts of Broadcast.com and similar enterprises is the ability of facility-owning ILECs and cable operators to regulate and affect the content of products delivered to ISPs and eventually viewed or heard on the Internet. Without competitively accessible high-speed wireline xDSL and HFC cable networks, ILECs and incumbent cable operators will have the opportunity to effectively "turn off" particular material transported to the Internet, such as the high bandwidth programming provided by Broadcast.com. In this manner, facility owners can control the content of the Internet products that end-users purchase, view, and listen to on the World Wide Web. In view of Congress' and the Commission's unequivocal commitment to ensuring that the Internet remains a medium free of such controls, this would be an unacceptable result for all Internet participants.

A variety of incumbent respondents to the Commission's Notice express strong resistance to the opening of broadband networks to all competitive service providers. US West, for instance, makes the point that only in the case of essential facilities or in circumstances in which there is the potential for a bottleneck should unbundling, access, and

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[6] Notice at ¶ 37.

resale obligations be imposed.[7] High-speed, broadband networks, however, are precisely the type of transport facilities that are "essential" to the deployment of advanced services and in which bottlenecks are forming and, in fact, currently exist. In the case of the wireline network, for instance, local competition in wireline telephony has failed to develop because ILECs have held on firmly to their monopolies over the local loop. Similarly, cable operators maintain a bottleneck over access to new HFC networks that permit them to offer high-speed Internet-based services via cable modems. It is in these non-competitive environments—in which anticompetitive abuses and discrimination are possible and, in fact, common—that unbundling and network access requirements are necessary to ensure a competitive market with the greatest consumer choice.

Moreover, the Commission is clearly empowered by the language of Section 706 to exercise its regulatory authority to ensure the competitive provision of advanced telecommunications capability and services. Although the Commission should rely largely on market forces to spur competition in Internet-based products and services, it must nonetheless carry out the mandate of Section 706 and should do so, as directed by Congress, by using any necessary regulatory tools. In this regard, the arguments of incumbent facility owners that the Commission lacks the authority to adopt market-opening policies pursuant to Section 706 are

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[7] *See* Comments of US West Communications Corporation at 27-28. Similarly, Bell Atlantic contends that there is simply no "'monopoly bottleneck' justification" for regulating high-speed services. Comments of Bell Atlantic at 8. What these respondents fail to recognize, however, is that the high-speed delivery of Internet products and services cannot be completed without access to last-mile facilities. If those facilities are controlled exclusively by ILECs and cable operators—with no obligation to provide competitive access—a bottleneck will necessarily emerge.

contrary to the plain language of the provision.[8]

Section 706 tasks the Commission with encouraging the deployment of advanced telecommunications capability and, in doing so, authorizes the Commission to utilize "price cap regulation, regulatory forbearance, measures that promote competition . . . , or other regulating methods that remove barriers to infrastructure investment."[9] Recognizing the need for market-opening measures, Congress authorized the Commission to adopt and enforce policies to ensure that all Americans are offered competitively-provided broadband products and services. The Commission, therefore, should not be swayed by arguments urging complete regulatory forbearance, a course that would only perpetuate the longstanding monopolies held by incumbent service providers and decrease consumer choice.

Contrary to the comments of several ILECs and cable operators,[10] the adoption of such policies will not stifle innovation and investment in the high-capacity, broadband networks that are necessary to the deployment of advanced services. These respondents' claims simply cannot be justified, for the enormous consumer demand for Internet services and Internet access, hailed in virtually all of the comments in this proceeding, will ensure that the necessary high-capacity, broadband networks are constructed and that innovation in the

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8 *See e.g.*, Comments of National Cable Television Association at 25-26; Comments of Time Warner Cable at 2, 6-7.

9 47 U.S.C. § 157(a).

10 For instance, AT&T argues that the Commission should avoid regulation that would "curb monopoly power" because it could slow the provision of broadband access services. Comments of AT&T Corporation at 40. Similarly, Cablevision Systems argues that any new regulatory burden placed on cable operators "would *dramatically* inhibit" both investment and the deployment of advanced services, and Ameritech claims that any unbundling or resale requirement would discourage the deployment of advanced telecommunications capabilities. Comments of Ameritech at 8-10.

provision of Internet services continues. As the growth of Internet-based products and services increases, consumers will demand higher-speed access to multimedia networks and, as a result, investment in broadband infrastructure, such as HFC cable plant and xDSL upgrades, will continue to rise. As correctly noted by Qwest, incumbents "will invest if and when it is economically justifiable to do so (or if they need to respond to competition.)"[11]

Moreover, as MindSpring Enterprises points out, neither the local telephone nor the cable industry has been an innovator in the Internet realm to any degree.[12] Rather, it has been the ISPs that have made substantial investment in the Internet and have achieved, for instance, the introduction of the high capacity xDSL service that is so crucial to today's high-speed Internet access.[13]

The Commission, therefore, should not be persuaded by unfounded claims that competitive access to broadband networks will deter investment and innovation in advanced services. Neither demand for Internet services nor investment in broadband infrastructure will be dampened by the requirement that incumbent facility owners provide access to their networks to unaffiliated ISPs. Rather, the resultant competition will require all entrants to continue to innovate and invest in order to reach customers quickly and offer them competitive products. If the broadband network is accessible and, therefore, competitive, then facility owners will voluntarily complete necessary build-outs quickly and have the incentive

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11 Comments of Qwest Communications Corporation at 20.

12 MindSpring Comments at 11.

13 *See* Comments of Retail Internet Service Providers at 5.

to make such facilities as open as possible.[14]

III. CONCLUSION

Relieving incumbent monopolies and requiring competitive access to broadband networks will permit the greatest range of consumer choice in Internet-based products and services. Neither ILECs nor cable operators should be permitted to hinder that consumer choice by advantaging their own, affiliated ISPs and foreclosing network access to competitive providers. Rather, the market for transmission services to the multitude of competing ISPs should be fully open to competition. Accordingly, Broadcast.com urges the Commission to resist arguments urging the maintenance of longstanding strongholds over "last-mile" facilities and, instead, to adopt policies requiring fair and nondiscriminatory access to these networks. Only then will consumers, the market, and broadband entrants realize the much-anticipated and complete deployment of advanced telecommunications capability.

Respectfully submitted,

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Dated: October 8, 1998

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[14] *See* MindSpring Comments at 22.